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In the Supreme Court of the United States

OCTOBER TERM, 1953

No.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

SERGE RUBINSTEIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, conditionally directing the United States District Court for the District of Columbia to issue an injunction restraining respondent's arrest pending final determination of his action for a declaratory judgment to review a deportation order.

OPINION BELOW

The opinion in the Court of Appeals (R. 19-29) is not yet reported. A prior opinion of that Court in the case appears at pp. 16-18 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 21-29.

QUESTIONS PRESENTED

1. Whether deportation orders issued after the new Immigration and Nationality Act became effective are judicially reviewable other than in habeas corpus proceedings.

2. Assuming the answer to question (1) to be in the affirmative, whether, where an alien institutes an action for judicial review of a deportation order within six months after the issuance of the order, a court has authority to enjoin the Attorney General from taking the alien into custody pending determination of the action.

STATEMENT

On December 29, 1952, an order of deportation was issued against respondent under Section 19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, on the ground that he had been convicted of a crime involving moral turpitude committed within five years after entry into the United States. Petitioner, who was allegedly admitted to the United States for permanent residence in 1938 and who had last entered this country in 1939 (R. 1) was convicted in 1947, on a charge of filing and conspiracy to file false affidavits in 1943 in order to

evade military service under the Selective Service and Training Act of 1940. *United States* v. *Rubinstein*, 166 F. 2d 249 (C.A. 2), certiorari denied, 333 U.S. 868.

The day after the order of deportation was issued, respondent filed a complaint (R. 1-4) in the United States District Court for the District of Columbia, under the Declaratory Judgment Act (28 U.S.C. 2201) and the Administrative Procedure Act (5 U.S.C. 1001, *et seq.*), against James P. McGranery, then Attorney General, praying for a judgment declaring the deportation order invalid and enjoining the Attorney General from taking respondent into custody (R. 4). *Inter alia*, the complaint alleged that respondent's crimes did not involve moral turpitude and that he had been denied due process in the administrative proceedings (R. 3). Respondent accompanied his complaint with a motion for a preliminary injunction to restrain the Attorney General from taking respondent into custody pending determination of the suit (R. 4-7). Judge Pine denied the motion (R. 7) and respondent appealed to the Court of Appeals. On January 5, 1953, the Court of Appeals, ruling that a declaratory judgment action lies to test the validity of a deportation order, remanded the motion to the District Court "for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings" (R. 8-9).

After the remand, on January 23, 1953, Judge Letts denied the motion, stating that it is well set-

tled law that a court will not issue a preliminary injunction unless the movant establishes with reasonable certainty that he will succeed in the ultimate action; that the only ground for respondent's motion which might possibly be considered substantial was his contention that his crimes did not involve moral turpitude; and that this contention was without merit (R. 9-13).

On January 24, 1953, respondent again filed a notice of appeal, and moved for an order restraining petitioner from apprehending and detaining respondent pending determination of the appeal (R. 13-15). The court below granted the motion on January 26, 1953, with Judge Fahy dissenting on the ground that, as he read Section 242(c) of the new Immigration and Nationality Act, *infra*, pp. 24-26, the Attorney General was authorized to arrest respondent after the entry of the order of deportation and decide whether to detain him during the period of litigation. Judge Fahy felt that respondent's proper remedy was in habeas corpus if he was administratively ordered detained (R. 16-18).

In an opinion dated June 11, 1953, the Court of Appeals remanded the case to the District Court with directions to issue a preliminary injunction restraining petitioner from revoking respondent's bail and from taking him into custody under a warrant of deportation pending final determination of his action, unless petitioner shows "that there are adequate reasons for the arrest." In this connection, the court held that *Heikkila* v. *Barber*, 345

U.S. 229, sustaining the Government's contention that the finality clause of Section 19(a) of the Immigration Act of 1917, 39 Stat. 890, as amended, precluded judicial review of deportation orders otherwise than in habeas corpus proceedings was not controlling, since, according to the opinion, the language and legislative history of Section 242 of the new Act, *infra*, pp. 21-26, reflected a purpose of Congress to make other avenues of review available (R. 20-24). The court further held that Section 242 (c) of the new law, *infra*, did not authorize the detention of respondent for the reason that the six-month period during which the statute gives the Attorney General discretion to detain an alien who has been ordered deported begins to run "if judicial review is had, * * * from the date of the final order of the court"; that the purpose of such detention is "to effect the alien's departure from the United States"; and that departure can not be effected while a deportation order is under judicial review. However, since the court thought that it was hardly reasonable that Congress intended to preclude the Attorney General from arresting an alien, under any circumstance, during the period of litigation regarding the validity of a deportation order, it interpreted Section 242(a) of the new law, *infra*, pp. 21-22, to authorize detention during such period even though that subsection literally applies only to the detention and release of aliens during the period while their deportability is being administratively determined. The court concluded, however, that under *Carlson* v. *Landon*, 342 U.S.

524, respondent's detention could not be justified unless it was shown that he is likely to abscond or that he is a security risk, which he allegedly is not. (R. 25-27.) Accordingly, it directed the issuance of an injunction against arresting respondent unless adequate reason for such arrest were shown. Judge Proctor dissented (R. 27-29), for the reasons generally speaking, advanced by Judge Fahy (*supra*, p. 4) and Judge Letts (*supra*, p. 4).

REASONS FOR GRANTING THE WRIT

The court below, in directing that petitioner be restrained from taking respondent into custody, has held (1) that the Immigration and Nationality Act has subjected deportation orders to review by the courts in proceedings other than habeas corpus, e.g., as in this case, in an action for an injunction and a declaratory judgment; (2) that in such an action the Attorney General may be restrained from taking an alien into custody pursuant to Section 242(a) or (c) of the Immigration and Nationality Act; and (3) that the Attorney General's exercise of the discretionary power vested in him by Section 242 to detain an alien who has been ordered deported pending judicial proceedings challenging the deportation order may be reviewed by the courts. Each of these issues is of general importance in the administration of the Act. As to the second, the four judges of the court below who have taken a position have divided evenly.* However, if, as we contend, the court below erroneously

* Judges Edgerton and Bazelon constituting the majority, as opposed to Judges Fahy and Proctor, dissenting on separate occasions.

decided issues (1) or (2), we believe that issue (3) need not be decided in this case.

1. In *Heikkila* v. *Barber*, 345 U.S. 229, decided on March 16, 1953, while the instant case was pending decision in the court below, this Court held that under the provision of Section 19(a) of the Immigration Act of 1917, that in deportation cases "the decision of the Attorney General shall be final", deportation orders could be challenged in the courts only in habeas corpus proceedings. In the instant case, in which the order for respondent's deportation was issued after the Immigration and Nationality Act of 1952 became effective, the court below has found that in the new Act Congress intended to subject deportation orders to direct judicial review, as in an action for injunctive and declaratory relief.[1] The opinion of the court below, read as a whole, indicates that the court would not have directed the issuance of a preliminary injunction absent a holding that the district court had jurisdiction to review the deportation order in an action for an injunction.[2]

We submit that the court below misread both the 1952 Act and its history. It is practically decisive that in almost the identical words of the 1917 Act,

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[1] District courts generally have considered the rationale of *Heikkila* v. *Barber*, *supra*, applicable under the 1952 Act. *Mirabel* v. *Glover* (D.C. P.R., Civ. No. 8445), June 18, 1953; *Ng Wong Dung* v. *Brownell* (S.D. N.Y., Civ. No. 84-356), June 10, 1953; *Sursos* v. *Zimmerman* (E.D. Pa., Civ. No. 14913), March 31, 1953; *Hyun* v. *London* (S.D. Cal., No. 15693-T), July 17, 1953.

[2] Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52, in which this Court reversed the grant of a preliminary injunction where the district court lacked jurisdiction over the main action.

Section 242(b) of the 1952 Act provides that "in any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final." As this Court noted in *Heikkila* v. *Barber*, 345 U.S. at 233-234, " 'final', as used in immigration legislation, has a history, both in the statutes and in the decisions of this Court," and "Read against this background of a quarter of a century of consistent judicial interpretation", it has the effect of precluding judicial intervention in deportation cases except in habeas corpus proceedings made available by the Constitution.

However, the court below held that Section 242 (c) and (e) of the 1952 Act expressly recognizes that there may be "judicial review" of deportation orders. This change in Congressional purpose was found primarily in the provision of Section 242(c) that "the Attorney General shall have a period of six months from the date of such [deportation] order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States * * *."[3] Referring to this Court's distinction in *Heikkila* between habeas corpus and "judicial review as that term is used in the Administrative Procedure Act" (345 U.S. at 236), the court below held that by this oblique reference to "judicial review" Section 242 reflected a Congressional purpose to make deportation orders reviewable otherwise

[3] A similar reference to "judicial review" appears in Section 242(e).

than in habeas corpus (R. 21). Relying upon the statement in the report of the Senate Committee on the Judiciary, S. Rep. 1137, 82nd Cong., 2d Sess., p. 28, that the omission of the provision of former bills specifically restricting review to habeas corpus was "not intended * * * to expand judicial review in immigration cases beyond that under *existing law*" (emphasis supplied), the court below concluded that the words "existing law" referred to the decision of that court and of the Third and Sixth Circuits,[4] later reversed by this Court in *Heikkila* v. *Barber, supra*, to the effect that Section 10 of the Administrative Procedure Act had made deportation orders reviewable by the courts in proceedings other than habeas corpus (R. 22).

To the contrary, we think that on the face of Section 242(c) and (e) the references to "judicial review" are merely a recognition that the actual deportation of an alien is deferred while Federal courts examine deportation orders in habeas corpus proceedings, for the purpose of insuring that the authorized detention period shall not end until six months after the Attorney General becomes free to effect the alien's removal. There is not the slightest indication that in referring to "judicial review" Congress was drawing a precise technical distinction from habeas corpus, or that, in referring to "existing law", Congress was acqui-

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[4] *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C.A. 3, 1948); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C.A. 3, 1950); *Kristensen* v. *McGrath*, 179 F. 2d 796 (C.A. D.C. 1949), affirmed in *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Prince* v. *Commissioner*, 185 F. 2d 578 (C.A. 6, 1950).

escing in the decisions of the Third, Sixth and District of Columbia Circuits which were later reversed *in Heikkila* v. *Barber, supra.* In fact, the evidence is to the contrary. Thus, in 1950, the Senate Committee on the Judiciary (which later reported the 1952 immigration legislation) issued its extensive report on *The Immigration and Naturalization Systems of the United States,* S. Rep. 1515, 81st Cong., 2d Sess., in which it stated (p. 629) that:

> * * * In a habeas corpus proceeding, based on a deportation case, the court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.

The quoted language reveals that as of 1950, *after* the decisions of the Third and District of Columbia Circuits which were reversed in *Heikkila,* the Senate Committee understood that under "existing law" habeas corpus was the exclusive method of challenging deportation orders in the courts. It also reveals, contrary to the assumption of the court below (R. 21), that the Committee understood that the Attorney General's findings must be supported by substantial evidence even in habeas corpus proceedings, thus indicating that by providing in Section 242 (b)(4) that "no decision of deportability shall be valid unless it is based upon reasonable,

substantial, and probative evidence" the Committee did not anticipate or intend that this language would make any changes in the reviewability of deportation orders.

For additional textual support, the court below relied upon the provision of Section 360(c) of the 1952 Act that "A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise." The court below interpreted this language as applying to exclusion cases generally and as indicating that where Congress desired to limit review to habeas corpus it did so specifically. In fact, this provision had an entirely different purpose and history. Under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, persons claiming to be citizens or nationals of the United States, regardless of whether such persons were within or outside the United States, were given a special declaratory judgment procedure to obtain a judicial determination of their claims. The purpose of Section 360(c) of the 1952 Act is to make that judicial procedure unavailable to all persons outside the United States and to provide for the determination of the claims of limited groups of such persons by the Attorney General in administrative exclusion proceedings. In providing that such determinations of the Attorney General "shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise", Section 360(c) is

obviously intended to emphasize and make clear the withdrawal of the right to an independent judicial determination. It has nothing to do with ordinary exclusion cases as to which Section 236(c) provides, like the former exclusion statute, that the administrative decision shall be final.

Finally, the court below relied upon statements by Senator McCarran and Representative Walter as evidencing a Congressional purpose to make deportation orders reviewable otherwise than in habeas corpus proceedings (R. 23-24). In our brief in *Martinez v. Neelly* (No. 218, O.T. 1945), affirmed *per curiam* by an equally divided court at 344 U.S. 916, the pertinent portions of which were incorporated by reference into our brief in *Heikkila* v. *Barber, supra,* we set forth the full context of the statements relied upon by the court below in the instant case.

In brief, the Court of Appeals relied heavily upon the statement of Representative Walter (98 Cong. Rec. 4416) that:

> Now we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedure Act is applicable. From that decision an appeal lies in the courts . . . In view of the fact that every person who is ordered deported has all of these administrative processes available,

> plus an appeal to the court, plus the right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator.

On its face, this statement is most persuasive because it was made in a successful attempt to defeat an amendment offered by Representative Meader to provide that "the order of deportation shall be subject to review by any court of competent jurisdiction." However, Representative Walter continued in the same statement to indicate that his conclusion quoted above was based upon a misunderstanding of the bill, for he added (still addressing himself to the Meader amendment):

> I am sure that if the gentleman will look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the *Sung* case will be the law of the land when this code is adopted.

Paragraph 46 on page 163 of the bill (H.R. 5678, 82d Cong., 2d Sess.) upon which Representative Walter relied, repealed the paragraph of the Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048) which, following this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, provided that, "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Ad-

ministrative Procedure Act." Since the applicability of the judicial review provisions of Section 10 is completely independent of Sections 5, 7 and 8, it is clear that neither the *Sung* decision nor the quoted provision of the Supplemental Appropriation Act had anything to do with the judicial review of deportation orders, and that the issue is equally unaffected by the repeal of that provision. Moreover, Representative Walter's interpretation of "final" as referring only to the end of the administrative process is inconsistent with the long-established judicial interpretation of such "final" provisions.[5]

As we pointed out in our brief in *Martinez* v. *Neely, supra*, at pp. 40-44, Senator McCarran's statements that "The Administrative Procedure Act is made applicable to the bill," and that "the Administrative Procedure Act prevails now," read in context, presumably relates to administrative procedures. And this limited meaning is made

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[5] This misunderstanding was repeated on the same day in the House when Representative Meader offered an unsuccessful amendment to subject to judicial review the Attorney General's exercise of the detention powers conferred by Section 242(a). In opposing this amendment, Representative Walter again stated (98 Cong. Rec. 4414) that:

> I would like to call the attention of the gentleman to the fact that on page 163 of the bill, paragraph 46, you will find that what the gentleman seeks to accomplish has been written into the law and the decision of the Supreme Court of the United States in the case of United States versus Sung has been reinstated. The rider that was attached to the deficiency appropriation bill has been set aside through the repeal of that particular section. So the judicial review is provided in all of these cases, and the gentleman's amendment is surplusage.

clear by Senator McCarran's successful opposition to amendments offered in the Senate which would have made deportation and exclusion orders reviewable otherwise than in habeas corpus. The amendments were defeated after a discussion indicating that the Senate was unwilling to make such a change without detailed study of the review problem.

Finally, it is incredible that in such a comprehensive revision and codification as the Immigration and Nationality Act of 1952, Congress would have failed to make its purpose clear if it had desired to change the established and often criticized rule that deportation orders may be challenged only in habeas corpus proceedings. Not only did Congress fail to express such a purpose, but it used again the language of finality which historically has thus limited review of deportation orders, and it repeatedly rejected amendments which would have provided a different form of review.

The court below, therefore, has erred in holding that the District Court had jurisdiction to review in an action for injunctive and declaratory relief the order for respondent's deportation and, therefore, had power to restrain the Attorney General from taking respondent into custody pursuant to Section 242 of the 1952 Act.

2. Even assuming, *arguendo*, that Congress intended in the 1952 Act that habeas corpus should no longer be the exclusive method for review of deportation orders, we submit that Section 242(c) of that Act precludes the issuance of an injunction

restraining the Attorney General from exercising his discretionary powers as to the detention or release of an alien against whom a final order of deportation has been entered.

Section 242(c) clearly contemplates that upon the issuance of a deportation order, the Attorney General shall have discretionary authority to take an alien into custody and decide whether to detain him or release him on such conditions as the Attorney General may prescribe, and that the commencement of an action for review of a deportation order within six months after the issuance of the order, as was done here, can have no effect on that authority other than to extend the period during which it may be exercised until six months after the final judgment in the case, if the judgment sustains the deportation order. While the court below felt that the detention provisions of Section 242(c) are inapplicable while a deportation order is being challenged in the courts, it avoided any time gap in the Attorney General's detention powers by holding that the detention provisions of Section 242(a) apply during such review period (as well as during the administrative deportation proceedings). However, we consider it immaterial which subsection applies in determining whether a court may enjoin the Attorney General from even exercising his discretion. Under either subsection, we contend, that no court has authority to preclude the Attorney General, by injunction, from arresting an alien and making the initial decision as to whether he should be detained and the conditions of his re-

lease if his detention is not deemed necessary or desirable. In fact, such anticipatory review of the Attorney General's prospective exercise of judgment and discretion is so unusual as to find analogy only in the rule that one cannot enjoin a criminal prosecution. *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163.

As both Judges Fahy and Proctor pointed out in dissent (R. 18, 27-29), the statute obviously contemplates that, after a deportation order is issued, the Attorney General will reexamine the matter of detention in the light of the facts established at the deportation hearing and the situation presented by the existence of the deportation order. See also *Spinella* v. *Savoretti*, 201 F. 2d 364 (C.A. 5), certiorari denied, 345 U.S. 975, holding that a habeas corpus action seeking review of an order detaining an alien pending determination of deportability became moot when the order of deportation was issued. This is similar to the situation in criminal cases where bail pending appeal involves very different considerations from bail pending trial. Congress clearly intended that, in the first instance, the determination will be made by the Attorney General. For such purpose, the Attorney General is clearly empowered to hold the alien in custody while that determination is being made. Thus, in ordering that the Attorney General be restrained before he had an opportunity to act as contemplated by the statute, the court below acted contrary to the clearly expressed Congressional

intent to leave the decision, at least in the first instance, for the Attorney General's discretion.

Moreover, regardless of whether subsection (a) or subsection (c) of Section 242 is thought to apply, both subsections contain a new provision (which was not present in the 1950 Act which was before this Court in *Carlson* v. *Landon*, 342 U.S. 524) to the effect that "Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, * * * upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case." This language reveals on its face that, leaving aside the scope of review of the Attorney General's exercise of discretion (see *infra*, p. 19), Congress intends that such review shall take place only in habeas corpus proceedings. This reading is confirmed by the reports of the Senate and House Committees on the Judiciary, which in describing the detention provisions of Section 242(b) and (c) state that such determination by the Attorney General "shall be subject to judicial review *only* upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch * * *" (emphasis supplied). S. Rep. 1137, pp. 29, 31, H. Rep. 1365, pp. 57-58, both 82d Cong., 2d Sess.

Also, the fact that, even in habeas corpus proceedings, Congress has conditioned the power of

the courts to review the Attorney General's exercise of these detention powers upon a conclusive showing that he is not proceeding with reasonable dispatch, is persuasive that he may not be enjoined at the threshold of the performance of his duties—without even an allegation that he is not proceeding with reasonable dispatch.

3. The court below has held that the Attorney General's decision to detain an alien pursuant to Section 242(c) is reviewable by the courts to the same extent that his exercise of similar powers under the predecessor Section 23 of the Internal Security Act of 1950 was held to be reviewable in *Carlson* v. *Landon*, 342 U.S. 524. The Court of Appeals for the Second Circuit has arrived at the same conclusion in *United States ex rel. Yaris* v. *Esperdy*, 292 F. 2d 109. The government has taken a contrary position in the lower courts, in reliance upon the new provision in the subsections (a) and (c) of Section 242 of the 1952 Act that courts shall have power to review or revise the Attorney General's decisions with respect to the detention of an alien upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch. See *infra*, pp. 21, 25. However, since, for the reasons indicated above, the courts below were without jurisdiction to review in this action issues relating to respondent's deportation and in any event acted prematurely on the detention isue, we do not believe that there are presented for decision in this case any issues as to

the interpretation or validity of these provisions relating to the review of detention actions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

AUGUST, 1953.

APPENDIX

The Immigration and Nationality Act (Pub. Law 414, 82d Cong., 2d sess.) provides in pertinent part:

> Sec. 242. (a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and

circumstances in the case of any alien to determine deportability.

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or

other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to

effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is hereby authorized, notwithstanding section 3709 of the Revised Statues, as amended (41

U.S.C. 5), or section 322 of the Act of June 30, 1932, as amended (40 U.S.C. 278a), to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

Sec. 360. * * *

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate

of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identify has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009, provides in part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

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(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law,

interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 19 (a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U.S.C. 155 (a), provided that any alien found subject to deportation "shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

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